Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JONATHAN GOLD, PETITIONER

v.

DEUTSCHE AKTIENGESELLSCHAFT, DEUTSCHE MORGAN GRENFELL/C.J. LAWRENCE, INC., PETER NASON, AND GREGORY WILLIAMS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether arbitration of a Title VII claim is appropriate under Section 118 of the Civil Rights Act of 1991 where an agency- regulated employer fraudulently certifies to the agency that the employee is familiar with the applicable agency rules?

2. Whether the conflict in the holdings of *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F.Supp. 190, 204, 211 (D. Mass. 1998), aff'd on other grounds, 170 F.3d 1(1st Cir. 1999) and *Prudential Insurance Co. Of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994), that a fraudulent agency-regulated employer certification as to familiarity with arbitration procedures renders a compulsory arbitration clause inappropriate under Section 118 of the Civil Rights Act of 1991, the reasoning of which were rejected by the Second Circuit below, is of sufficient importance to be resolved by this Court?

3. Whether an unanswered complaint which alleges misrepresentation, high pressure tactics or, unfair dealing or lack of notice of an arbitration clause in a regulated agency form, is sufficient under FRCP R.8(e)(1) to raise an issue as to whether there are special circumstances which would render arbitration of a Title VII claim in appropriate?

4. Whether a Title VII claim is subject to a compulsory arbitration clause which is foisted upon an employee who has no knowledge of its existence in a form which the employee is instructed to sign with a dozen other forms without explanation?

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OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 365 F.3d 133 (2d Cir. 2004) and appears in Appendix A to this Petition at App. 1a. The Orders of the District Court appealed from and the order compelling arbitration are unpublished and appears in Appendix A to this Petition at App. 14a, 16a and 20a.

JURISDICTION

The Opinion and Judgment of the Court of Appeals were entered on April 21, 2004. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Arbitration Act, 9 U.S.C. §2; Civil Rights Act of 1991, §118; and Title VII of the Civil Rights Act of 1964 42 U.S.C. §§2000e, et seq., as amended.

Federal Arbitration Act, 9 U.S.C. §2

> "An agreement in writing to submit to arbitration an existing controversy ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for revocation of any contract."

Civil Rights Act of 1991, §118

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact finding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Title VII of the Civil Rights Act of 1964 42 U.S.C. §§2000e

> It is "an unlawful employment practice for an employer... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."

STATEMENT OF THE CASE

1. Factual Background

Plaintiff-petitioner Jonathan Gold ("Petitioner") brought an action for damages under Title VII claiming that he was subject to a hostile work environment and quid pro quo sexual harassment by defendant-respondent Deutsche Aktiengesellschaft et al. ("Bank") and two of its employees (collectively "Respondents"). Petitioner accepted the Bank's offer of employment and

after a week-long training seminar, more than 20 other management trainees and Petitioner were brought into a back office and instructed, as a condition of employment, to sign more than a dozen forms without any explanation of their content. The entire procedure took no more than 15 minutes with everyone basically standing around. The forms included a U-4 which contained a compulsory arbitration clause. No one ever told the Petitioner or other trainees that a Title VII claim was subject to the following arbitration clause:

> 5. I agree to arbitrate any dispute claim or controversy that may arise between me and my firm, or a customer or any other person that is required to be arbitrated under the rules, constitutions, or by laws of the organizations indicated in Item 10 as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent jurisdiction. (Emphasis added)

Petitioner was never given a copy of the "rules, constitutions, or by-laws of the organizations indicated in Item 10 viz., the National Association of Securities Dealers and the New York Stock Exchange; nor did any Bank personnel refer to or mention those rules to Petitioner. Nevertheless the Respondent Bank fraudulently certified on the U-4 form that the Petitioner was familiar with those rules.[1]

---

[1] The Court of Appeals below found it "troubling that Deutsche Bank certified that it provided Gold with NASD rules when it had not...." and confirmed at Footnote 3 of its decision

The Petitioner's complaint at paragraph "23", specifically alleged that the arbitration clause did not apply to his "human rights" claim, because he "was required to sign numerous forms". More importantly, at paragraph "24" he specifically pleaded that his case was identical to *Berger v. Cantor Fitzgerald*, 942 F. Supp. 963 (S.D.N.Y. 1996), which found that a U-4 arbitration clause would not be binding if there were "special circumstances"[2]. Paragraph "24" reads:

> 24. Plaintiff refers to the case of *Berger v. Cantor Fitzgerald*, 942 F. Supp. 963 (S.D.N.Y. 1996) which held that a plaintiff's signature on a Form U-4 would not bind the plaintiff to arbitration if plaintiff could show special circumstances surrounding the execution of the form including misrepresentation, high pressure tactics or lack of notice within the Form (4) corners of the agreement. Therefore the issue of enforceability required more discovery. Similarly, plaintiff here claims lack of notice that by signing such agreement he would be waiving his right to a judicial resolution of

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"Form U-4 requires the employer to sign a statement that 'at the time of approval, [the applicant] will be familiar with the statute(s), constitution(s), rules and by-laws of the agency, jurisdiction or self-regulatory organization with which this application is being filed....' In Rosenberg, as in this case, the employer had signed the form, 'certifying' the applicant's familiarity with NASD rules." (App. 12a)

[2] The importance of paragraph "24" and the Berger case as it relates to the Petitioner are discussed fully herein.

a human rights claim.

In addition, in an affidavit in support of Petitioners' District Court motion for reconsideration, discussed infra, he stated:

> 3. ...at no time during the interview process was I informed that as a condition of my employment I would be required to waive my right to a judicial resolution of discrimination claims arising out of my employment. On January 9, 1995, I accepted the Bank's offer of employment.
>
> 4. After a week-long training seminar from August 7 to August 13, 1995, more than 20 other management trainees and I were brought into a back office at the Bank and instructed to sign more than a dozen forms without any explanation of their content; no opportunity to ask questions or review the forms; and, no notice that I would be waiving my right to a judicial determination of any Title VII or other human rights claims.
>
> 5. The entire procedure lasted no more than 10 to 15 minutes with everyone standing around or sitting at the few available desks blindly signing the forms. I later learned that I signed a U-4 form which contained the [arbitration clause].
>
> 6. I was never presented with or shown a copy of the "constitutions," or "by-laws"

of the organizations indicated in item "10...."

7. I never knowingly or voluntarily elected to waive my right to a judicial proceeding in favor of arbitration in the event of a Title VII claim. More importantly, I would not have waived that right as a condition of my employment by the Bank. (Emphasis added) (App. 28a)

2. Proceedings in the District Court

Respondents' motion for a stay pending arbitration under the U-4 clause was granted by District Court Judge Kimba M. Wood. Petitioner moved for reconsideration on the ground of recent decisions in *Duffield v. Robertson Stephens & Co.*, 144 F. 3d 1182 (9th Cir. 1998), which ruled a U-4 arbitration clause inapplicable to Title VII claims; the reasoning in *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190 (D. Mass. 1998),[3] which ruled that a U-4 arbitration clause was invalid i.e., "inappropriate" under Section 118 of the Civil Rights Act of 1991 which amended Title VII, where the employer falsely certified that the employee was familiar with the statutes, constitutions, rules and by-laws of the NASD and NYSE; and *Berger v. Cantor Fitzgerald*, 942 F. Supp. 963 (S.D.N.Y. 1996), in which the court ordered discovery where there was special circumstances surrounding the execution of the U-4 viz.,

[3] The Rosenberg case, which was affirmed on grounds different from Duffield , at 170 F. 3d (1st. Cir. 1999) is discussed in great detail infra.

"misrepresentation, high pressure tactics, and unfair dealings."

The District Court denied reconsideration on the grounds that the *Duffield* view of the U-4 was the minority position and that the Petitioner had failed to make the Berger allegations in his opposition to the motion to stay, notwithstanding that as stated supra, Berger was specifically referred to at paragraph "24" of the complaint. (See Page "4" supra).[4]

Petitioner's Title VII claim, which was the subject of hearings beginning April 18, 2002 was denied on January 29, 2003; and his motion to vacate the prior order staying the action was denied by order dated March 7, 2003 on the ground that Berger did not apply because "'the Court finds no merit in any of plaintiff's...arguments that plaintiff did not enter into a valid and enforceable agreement to arbitrate arising out of his employment with defendants.'"

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[4] It is profound that the Court of Appeals below erroneously concluded that "Moreover, Gold 's complaints that the district court ignored other factual allegations similar to those in Berger - that he was given little time to fill out Form U-4 and was not provided with the NASD rules- do not justify reversal here. As noted above, those allegations were made for the first time in July 1998 in Gold's motion for reconsideration, even though Gold obviously knew the facts when he filed his complaint approximately 17 months earlier. (Emphasis added) (See paragraph "24" of the complaint.)

3. Proceedings in the Court of Appeals

The Court of Appeals affirmed the order of the District Court, rejecting Petitioner's following arguments:

1. The arbitration clause is invalid as applied to Petitioner, under the holding in *Rosenberg* because the Respondent Bank fraudulently certified that the Petitioner was familiar with and given a copy of the statutes, constitutions, rules and by-laws of the NASD and NYSE.

As to the *Rosenberg* argument, the Court of Appeals ruled, notwithstanding the total identity of the facts in the instant case:

> We respectfully decline to follow the reasoning of the majority in *Rosenberg*. While a court may need to determine whether arbitration of Title VII claims is "appropriate" in specific instances, §118, 105 Stat. At 1081, we think that Gold's failure to fully read and question Form U-4 before signing it undermines his claim that we should find the arbitration clause unenforceable, regardless of whether the rights he seeks to enforce spring from Title VII. Whether one can be bound by an arbitration clause is usually determined by looking at generally accepted principles of contract law. [citing cases]

2. That there were special circumstances surrounding the signing of the U-4 form which required discovery under *Berger v. Cantor Fitzgerald Securities*, 942 F.Supp. 963 (S.D.N.Y. 1996).

As to the *Berger* argument, the Court of Appeals ruled, notwithstanding that the Petitioner specifically pleaded reliance upon *Berger* in Paragraph "24" of the unanswered complaint, that *Berger* did not apply:

> As noted above, those allegations were made for the first time in July 1998 in Gold's motion for reconsideration, even though Gold obviously knew the facts when he filed his complaint approximately 17 months earlier. Therefore, the district court would have been well within its discretion to disregard them. Even if we take the allegations into consideration, as we point out hereafter, Gold has not made a persuasive case for finding the arbitration clause in Form U-4 invalid. (Emphasis added) (App. 13a)

3. Title VII claims are not subject to compulsory arbitration under the *Duffield* holding.

As to the *Duffield* argument, the Appellate Court said,

> "The Ninth Circuit itself has now come to the same conclusion and has repudiated the *Duffield* decision - *EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 749 (9th Cir. 2003) (en banc)* [as

Desiderio v. National Association of Securities Dealers, Inc., 191 F.3d 198 (2d Cir. 1999)]. Under *Desiderio*, Judge Wood's conclusion that Gold's Title VII claims were arbitrable was clearly correct." (App. 7a)

REASONS FOR GRANTING THE WRIT

POINT I

THE REASONING OF THE FIRST CIRCUIT IN ROSENBERG SHOULD BE MADE UNIFORM BY THIS COURT

The Petitioner alleged that he "was never presented with or shown a copy of the 'constitutions' or 'by-laws' of the organizations indicated in Item "10", referred to in the U-4 arbitration clause. More importantly, the Court of Appeals below said:

> Although it may be troubling that Deutsche Bank certified that it provided Gold with the NASD rules when it had not, it was ultimately Gold's responsibility to ensure he understood the document he signed.
>
> Moreover, while it would have made sense for Deutsche Bank to have explained the form and to have provided Gold the NASD rules that were incorporated by reference, we do not find on this record that the failure to do so renders the arbitration clause invalid.

(App. 10a)

As noted at footnote "1" of this Writ, the appeals court said, "In *Rosenberg* as in this case, the employer had signed the form, 'certifying' the applicant's familiarity with NASD rules".

The court in *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F.Supp. 190, 204, 211 (D. Mass. 1998), aff'd on other grounds, 170 F.3d 1(1st Cir. 1999) was faced with the identical U-4 form and false certification of familiarity, and the question whether the fraud ipso facto invalidated the arbitration clause in the face of a Title VII claim. The *Rosenberg* court reasoned that the failure to provide the employee with the arbitration rules was fatal because the arbitration clause itself, as in the instant case, failed to define the scope of arbitrable claims:

> We set the context. Rosenberg's and Merrill Lynch's arbitration agreement did not by itself define the range of claims subject to arbitration, even though Merrill Lynch expressly represented that she would be advised of the rules. It referred only to arbitration of such claims as were required to be arbitrated by the NYSE rules. But those rules were not given to Rosenberg or described to her. The question then becomes which party should bear the risk of her ignorance. Given Congress's concern that agreements to arbitrate employment discrimination claims should be enforced only where "appropriate," a concern not

expressed in the FAA or at common law, Merrill Lynch should, we believe, bear that risk.

As part of its employment agreement with Rosenberg, Merrill Lynch required her to agree to the terms of the U-4 Form. The U-4 Form, prepared under the NYSE Rules, requires that employees being asked to execute the U-4 Form be given a copy of the NYSE rules or information to the same effect, at least by the time of approval. The U-4 Form thus explicitly contemplated that Merrill Lynch would take the steps necessary to ensure that Rosenberg was aware of the NYSE rules. The same U-4 Form that Rosenberg signed to register with the NYSE was also signed by John Wyllys on behalf of Merrill Lynch.... Under the heading, "THE FIRM MUST COMPLETE THE FOLLOWING [certification]...."

Wyllys' signature follows this statement. But Wyllys' certification was false: Merrill Lynch never provided Rosenberg with a copy of the rules and Merrill Lynch has provided no evidence it made Rosenberg familiar with the rules as to arbitration. Merrill Lynch's failure runs afoul of the mutual understandings. Since the arbitration requirement stems from the NYSE Rules and the U-4 Form requires that the employee be "familiar with" the

> rules and thus with the requirement for arbitration of employment claims, we think that Merrill Lynch's inaction undercuts the imposition of an arbitration agreement. The NYSE rules contemplated that Merrill Lynch certify to it that, at least as of the time of NYSE approval of Rosenberg's application, Rosenberg be "familiar" with the rules including the rules that all employment disputes be arbitrated. Merrill Lynch's failure, we believe, makes it inappropriate to enforce the provision. Id. at 19-20.

The Court of Appeals below said, in the face of Rosenberg's impeccable logic:

> We respectfully decline to follow the reasoning the majority in *Rosenberg*.... Whether one can be bound by an arbitration clause is usually determined by looking at generally accepted principles of contract law....Under such principles, in the absence of fraud or other wrongful act on the part of another contracting party, a party "who signs or accepts a written contract ... is conclusively presumed to know its contents and to assent to them...."

The trouble with the Second Circuit reasoning is that, contrary to *Rosenberg*, it punishes the Petitioner and puts the burden upon him to overcome the Respondent Bank's fraudulent certification. Of more importance, the Court's ratio descidendi is that the

Petitioner was bound by "generally accepted principles of contract law" because he "[failed] to fully read and question Form U-4 before signing it". On the other hand, while the court carves out an exception for "fraud or other wrongful act," it turns a blind eye to Petitioner's complaint which pleads the *Berger* elements, or his affidavit for reconsideration in which he affirmatively alleges what amounts to a "wrongful act", if not "fraud": (1) he was never informed that he would have to waive his rights to a judicial resolution of discrimination claims; (2) he was brought to a back office with more than twenty other tired management trainees and "instructed to sign more than a dozen forms without explanation;" (3) he had no opportunity to ask questions or review the forms; (4) he was given no notice of a waiver of rights; (5) he was given ten to fifteen minutes to sign a dozen forms sitting at a few available desks, blindly signing forms; (6) he was never given a copy of the statutes, rules, constitution or by-laws which require arbitration; and (7) he never knowingly or voluntarily waived his rights and would not have done so.

The false certification is an obvious fraud; even more obvious is that the procedure for causing the Petitioner to sign the U-4 was a "wrongful act" - willful or not - which satisfies the Second Circuit's own exception to the "generally accepted principles of contract law". It is enlightening in this context that the court finds the Respondent Bank's false certification as "troubling" and that "it would have made more sense to have explained the form and to have provided Gold the NASD rules that were incorporated by references." (App. 10a)

The Second Circuit decision herein is also in direct conflict with the Ninth Circuit decision in *Prudential Insurance Co. Of America v. Lai*, 42 F.3d 1299, 1301 (9th Cir. 1994) which follows the *Rosenberg* reasoning:

> In this case, even assuming that appellants were aware of the nature of the U-4 form, they could not have understood that in signing it, they were agreeing to arbitrate sexual discrimination suits. The U-4 form did not purport to describe the types of disputes that were to be subject of arbitration. Moreover, even if appellants had signed a contract containing the NASD arbitration clause, it would not put them on notice that they were bound to arbitrate Title VII claims. That provision did not even refer to employment disputes....Our decision does not rest exclusively upon the precise language of the clause in the U-4 manual, for it is clear and undisputed on this record that the employment contract with Prudential that plaintiffs executed did not describe any disputes the parties agreed to arbitrate. Id. at 1304.

Clearly, the Second Circuit decision which is in conflict with the aforesaid First and Ninth Circuits decision which must be resolved by this Court. The issues to be determined are actually threefold: (1) Does an improper employer certification that the employee is familiar with the arbitration rules ipso facto create a

special circumstance? (2) Does an employer become immune from the *Rosenberg* consequences of an improper certification merely because the employee failed to read the clause? (3) Who bears the burden of a false certification and failure to provide the applicant with the NASD rules?

POINT II

THE SPECIAL CIRCUMSTANCE DOCTRINE OF *BERGER v. CANTOR FITZGERALD* IS SATISFIED WHEN A PLEADING ALLEGES BERGER ELEMENTS

The Petitioner's complaint clearly relies upon Berger which is cited and summarized at paragraph "24" and specifically enumerated in his affidavit in support of his motion for reconsid0eration. In *Berger v. Cantor Fitzgerald Secs.*, 942 F.Supp. 963 (S.D.N.Y. 1996) the plaintiff claimed discrimination based upon his sexual orientation under the Americans with Disability Act, Title VII, and New York Human Rights Law. The Southern District denied defendants' motion to compel arbitration, holding that discovery was necessary as to plaintiff's claim that he was tricked into signing the arbitration agreement through misrepresentation, high pressure tactics, and unfair dealings. The plaintiff claimed that he was told that the U-4 form was an "application to become a registered government securities broker;" had only five minutes to fill out the application; and was never given the NASD manual to which the U-4 referred. The court held that proof of such facts would constitute "special circumstances" under which a signatory to such a contract would not be bound and noted that arbitration

agreements are enforceable "save upon such grounds as exist in law or equity for the revocation of any contract". Id. at 965

In Judge Woods' decision denying Petitioner's motion for reconsideration, the court distinguished the instant case from *Berger*, on the ground that Petitioner failed to allege an outright misrepresentation. But the *Berger* court actually said, "The parties are directed to commence discovery on plaintiff's claim that he was induced to sign the U-4 claim by misrepresentation, high pressure tactics and unfair dealings...." (Emphasis added)

In fact, petitioner used the words "representation" high pressure tactics or lack of notice" because federal pleadings are based on simplicity.[5]

In its decision from which this appeal was taken to the Court of Appeals, Judge Woods said that *Berger* did not apply because ""The Court finds no merit in any of plaintiff's... arguments that plaintiff did not enter into a valid and enforceable agreement to arbitrate arising out of his employment with defendants.'" (App. 15a)

The Appellate Court's sole observation about Petitioner's *Berger* argument was that "Gold has not made a persuasive case for finding the arbitration

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[5] Federal Rules of Civil Procedure Rule 8(e)(1) states:
(e) Pleading to be Concise and Direct; Consistency
(1) Each averment of a pleading shall be simple, concise and direct. No technical forms of pleadings or motions are required.

clause invalid" (App. 13a)

It is respectfully submitted that such holding by the Second Circuit which disregards the allegations of the Petitioner's complaint and affidavit is in direct conflict with the *Rosenberg*, First Circuit, and *Prudential*, Ninth Circuit, cases in which the courts' findings based solely upon the allegations of the complaint, were that such special circumstances ipso facto emasculated the arbitration clause.

POINT III

A TITLE VII CLAIM SHOULD NOT BE SUBJECT TO MANDATORY ARBITRATION UNLESS SPECIFICALLY AND KNOWINGLY WAIVED

In *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1186, 1199 (9th Cir. 1998) where the plaintiff brought, inter alia, a sexual discrimination and harassment suit under Title VII, the Ninth Circuit, citing a plethora of cases, found a pre-dispute agreement to arbitrate as a condition of employment precluded by the 1991 Civil Rights Act on the ground that Congress intended federal courts to oversee the enforcement of rights granted under Title VII.

The standard to apply in determining the enforceability of arbitration agreements under the Federal Arbitration Act ("FAA") was set out by the Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d. 444 (1985)

> Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for statutory rights at issue. Id. at 628. (emphasis added.)

Congress, in an amendment to the original version of Title VII, explained its reasoning by stating that:

> [T]he nature of Title VII actions more often than not puts parties of unequal strength and resources against each other. The complainant, who is usually a member of a disadvantaged class, is opposed by an employer who not infrequently is one of the nation's major procedures. H.R. Rep. NO. 238, 92d Cong. 2d. Sess (1972)

This viewpoint is applicable to the case herein, as Petitioner is a lone individual who was subject to sexual discrimination from all sides at his job with no resources to take on his powerful employer. To subject any individual to a securities industry arbitration to test such treatment would be to ignore the intent of Congress in passing Title VII. To allow an institution as powerful as the Respondent Bank to foist arbitration upon Petitioner is tantamount to a dry-cleaner exculpating itself from liability in its printed garment receipt; a result precluded as a matter of public policy. It is submitted that a U-4 form arbitration clause should be ipso facto void as a matter of strong public policy.

In the wake of *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 Sup. Ct. 1647 (1991) which found that the ADEA did not prevent arbitration of a compulsory arbitration clause, Congress amended Title VII with the Civil Rights Act of 1991 which dealt expressly with the issue of arbitration of Title VII claims. Than section provides:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact finding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title. (Emphasis added)

The crucial language of Section 118 with respect to arbitration, according to *Duffield*, is the statement encouraging arbitration, "where appropriate and to the extent authorized by law." In reading this language one must be aware that "where appropriate" and "to the extent authorized by law," are each separate and distinct limitations on the arbitration process. Id. at 10. "Where appropriate" must be read to further the object and purpose of the Act. In other words, if victims of discrimination choose to pursue their claim in an alternative forum (i.e., arbitration), this is to be encouraged. Id.

The legislative history of §118 speaks directly to Congress' intent:

> This section contemplates the use of voluntary arbitration to resolve the specific disputes after they have arisen, not coercive attempts to force employees in advance to forego statutory rights. No approval whatsoever is intended of the Supreme Court s recent decision in *Gilmer*...or an application or extension of it to Title VII. *Rosenberg* at 1998 W.L. 880910 *13, quoting 137 Cong. Rec. H.9505-01 *H9530 (Nov. 7, 1991)

The intent of Congress is clear in demonstrating that Title VII claimants should not be forced to choose between their jobs and their Civil Rights. Accordingly, the Court should hold that the Form U-4 which is executed as a mandatory condition of employment in the securities industry is void and unenforceable with respect to Title VII claims.

It is respectfully submitted that because of the uniqueness and profoundness of the issue this Court is free to, and should follow the holding in *Duffield* which carefully and studiously analyzed the Congressional intent behind the Act notwithstanding that the Ninth Circuit has now specifically rejected *Duffield* in *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 749 (9th Cir. 2003).

It is Petitioner's position that this Court has not previously ruled on the question before it should adopt a ruling which reflects not only the existing body of case law and interpretations of Congressional intent, but, as well, the common sense approach that absent a clear, knowing, voluntary waiver of rights, a signature

on a U-4 does not waive judicial proceedings in favor of arbitration in a system dominated by the securities industry, in which the Title VII claimant has no equal right to the appointment of an arbitrator.

Indeed, the Court of Appeals below hedged its opinion that a Title VII claim is ipso facto subject to a compulsory arbitration clause even when there is "mere inequality in bargaining power" saying:

> We recognize that there may be circumstances under which courts will not enforce pre-dispute mandatory arbitration agreements with regard to statutory employment discrimination claims....But given the very strong federal policy favoring arbitration and the purpose behind the FAA to "place arbitration agreements upon the same footing as other contracts," *Gilmer*, 500 U.S. at 24, we cannot accept a rule that would allow a party to avoid his legal obligation to read a document carefully before signing it just because the document is an arbitration agreement under which Title II claims could be arbitrated. (Emphasis added)

The answer to the question as to whether an arbitration clause should be foisted upon an employee should not be subject to whether the employee was excused from reading the "document carefully".

CONCLUSION

Petitioner submits that this petition for a writ of certiorari brings before this Court substantial questions for review, all of which require plenary consideration with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

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(Any footnotes trail end of each document)

Docket No. 03-7283

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JONATHAN GOLD,
Plaintiff-Appellant,

- against -

DEUTSCHE AKTIENGESELLSCHAFT, DEUTSCHE MORGAN GRENFELL/C.J. LAWRENCE, INC., PETER NASON, and GREGORY WILLIAMS,
Defendants-Appellees.

October 31, 2003, Argued
April 21, 2004, Decided

COUNSEL: JOSEPH O. GIAIMO, Giaimo & Vreeburg, LLP, Kew Gardens, NY, for Plaintiff-Appellant.

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LAWRENCE R. SANDAK, Proskauer Rose LLP, Newark, NJ, for Defendant-Appellee Gregory Williams.

JUDGES: Before: FEINBERG, KEARSE, and RAGGI, Circuit Judges.

OPINION BY: FEINBERG

OPINION: FEINBERG, Circuit Judge:

Plaintiff-appellant Jonathan Gold was hired by defendant-appellee Deutsche Aktiengesellschaft ("Deutsche Bank" or the "Bank") in 1995. Before beginning his employment, Gold signed various documents, including one that contained an arbitration clause requiring all employment disputes with the firm to be arbitrated. After his termination from the company approximately a year later, Gold brought the instant suit under Title VII, 42 U.S.C. §§ 2000e to e-17, and state law, claiming sexual harassment based on sexual orientation. The United States District Court for the Southern District of New York (Kimba M. Wood, J.), on defendants' motion, ordered arbitration of the dispute and then, following the arbitration proceedings, dismissed Gold's suit. Gold appeals, arguing that (1) Title VII claims cannot be subject to mandatory arbitration; and (2) the "special circumstances" of his case require reversal of the district court's order. For the reasons set forth below, we reject Gold's arguments and affirm the order of the district court.

I. Background

A. Gold's Employment at Deutsche Bank

While Gold was in his final year of an MBA program at New York University, he accepted a position with Deutsche Bank for employment after graduation.

According to Gold, he took the job with Deutsche Bank despite offers from several other employers because Deutsche Bank assured him that he would work in a few different areas at the Bank and be groomed for positions of continually increasing authority. Gold alleges that after he began his employment in August 1995, Deutsche Bank failed to fulfill its promises. Gold, who is homosexual, alleges that once his sexual orientation was known, he was assigned to menial tasks such as purchasing chewing tobacco, fetching coffee and lunch for co-workers, and making photocopies. In April 1996, Gold was transferred to Deutsche Morgan Grenfell/C.J. Lawrence, Inc. ("Deutsche Morgan"), a subsidiary of Deutsche Bank. Gold claims that his immediate superior at Deutsche Morgan, defendant-appellant Peter Nason, created a hostile work environment, berating Gold and making fun of him on the basis of his sexual orientation. Gold also alleges that defendant-appellant Gregory Williams, a senior employee at the Bank, subjected him to quid pro quo sexual harassment, promising Gold that he would help him with his problems at the Bank if Gold entered into a sexual relationship with him. In June 1996, Deutsche Morgan terminated Gold's employment.

B. Gold's Title VII Claim and Arbitration

In February 1997, Gold filed his complaint in the Southern District, alleging that he had been subjected to hostile work environment and quid pro quo sexual harassment on the basis of sexual orientation in violation of Title VII. n1 Gold alleged in his complaint that at a training session prior to beginning his employment, he was required to sign numerous forms, including Form U-4, which the National Association of

Securities Dealers, Inc. ("NASD") requires all "registered representatives" to sign. Form U-4, under a heading stating, "THE APPLICANT MUST READ THE FOLLOWING VERY CAREFULLY," provided in relevant part:I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations indicated in Item 10 as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgement in any court of competent jurisdiction.Item 10 of Form U-4 indicated that Gold would be registered with the NASD. The NASD Code of Arbitration Procedure, Part II, § 8(a), provides for arbitration of "any dispute, claim or controversy . . . arising out of the employment or termination of employment of . . . associated person(s) with [a] member . . . ." At the time Gold signed Form U-4, he did not challenge or question the arbitration clause. However, in his complaint, Gold claimed "lack of notice that by signing such agreement he would be waiving his right to a judicial resolution of a human rights claim."

After Gold filed his complaint, defendants-appellees moved to compel arbitration. In a written opinion filed in March 1998, Judge Wood compelled arbitration and stayed Gold's lawsuit. The judge held that an employee who had agreed to Form U-4's broad arbitration clause could be required to submit employment discrimination claims to arbitration. Judge Wood also found that Gold had not alleged sufficient special circumstances to justify holding the arbitration clause unenforceable.

In July 1998, Gold moved under Federal Rule of Civil Procedure 60(b) for reconsideration. n2 The motion

asked the district court to consider recent decisions of the Ninth Circuit and the District of Massachusetts holding that Title VII claims were not subject to mandatory arbitration pursuant to the arbitration clause in Form U-4. See Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1199-1200 (9th Cir. 1998); Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 995 F. Supp. 190, 204, 211 (D. Mass. 1998), aff'd on other grounds, 170 F.3d 1 (1st Cir. 1999). An affidavit submitted by Gold with the Rule 60 motion further alleged for the first time that when Gold signed Form U-4, he was brought into an office along with more than 20 other management trainees, was instructed to sign more than a dozen forms without any explanation of their content, was not given any opportunity to ask questions or review the forms and was given no more than 10 to 15 minutes to review and sign the forms.

In January 1999, the district court denied the Rule 60 motion on the ground that the two decisions relied upon by Gold went against the weight of authority in the Second Circuit that arbitration of Title VII claims was appropriate. The court also found that Gold had not alleged outright misrepresentation or other special circumstances sufficient to justify holding the arbitration clause unenforceable.

Gold proceeded to arbitration before an NASD panel. After 30 hearings, the arbitration panel concluded that Gold did not meet his burden of proving his discrimination claims against Deutsche Bank, Deutsche Morgan, Nason or Williams. In January 2003, the panel dismissed all of Gold's claims and assessed fees to each party. Gold then asked the district court to lift the judicial stay, arguing again that his Title VII claims

were not subject to the mandatory arbitration provisions of Form U-4. Citing our opinion in Desiderio v. National Association of Securities Dealers, Inc., 191 F.3d 198 (2d Cir. 1999), which had been decided after Gold's Rule 60 motion was denied, the district court in March 2003 denied Gold's request and closed the case. Gold now appeals from that order.

II. Discussion

On appeal, Gold renews his arguments that (1) Title VII claims are not subject to mandatory arbitration; and (2) in the alternative, the special circumstances of his case render the arbitration clause invalid. We review a district court's determination of arbitrability de novo. Chelsea Square Textiles, Inc. v. Bombay Dyeing and Mfg. Co., 189 F.3d 289, 295 (2d Cir. 1999).

A. Arbitrability of Title VII Claims

In addressing Gold's claims, we note first the strong federal policy -- manifested in the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. -- favoring arbitration. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24-25, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983). As we have acknowledged before, the Supreme Court, this court and other courts have all indicated that "the ancient judicial hostility to arbitration is a thing of the past." Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 200 (2d Cir. 1998). Indeed, the strong presumption in favor of arbitration has survived even the "greater scrutiny," id. at 201, given to the use of mandatory pre-dispute arbitration agreements, like the one Gold signed, to

resolve statutory claims of employment discrimination. Courts have consistently found that such claims can be subject to mandatory arbitration. See, e.g., Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123, 149 L. Ed. 2d 234, 121 S. Ct. 1302 (2001) ("The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law[.]"); Gilmer, 500 U.S. at 35 (ADEA); Desiderio, 191 F.3d at 203, 206 (Title VII).

Nevertheless, again relying on the Ninth Circuit's decision in Duffield v. Robertson Stephens & Co., 144 F.3d at 1199-1200, Gold urges us to reverse the district court. In Duffield, the Ninth Circuit held that the arbitration clause in Form U-4 was unenforceable as applied to Title VII claims. Id. But in Desiderio, 191 F.3d at 205, we explicitly rejected the Duffield reasoning in concluding, along with the majority of other circuits, that Title VII claims could be subject to compulsory arbitration, id. at 206. Gold claims, however, that the factual circumstances in Duffield -- an employee who was "unaware" of the arbitration clause in Form U-4 -- mirror his own situation. He argues that our decision in Desiderio is distinguishable.

In Desiderio, a bank offered the plaintiff employment as a securities broker, contingent upon her registering with the NASD and signing Form U-4. The plaintiff refused to sign Form U-4 unless the mandatory arbitration provision was stricken. When the NASD refused to alter the form, the bank revoked its offer of employment to the plaintiff. Gold contends that his case is factually different from Desiderio because the

plaintiff there was fully aware of the arbitration clause, and refused to sign Form U-4, while Gold was not fully aware of the contents of Form U-4. But whether the plaintiff was "aware" of the arbitration clause was not dispositive in either Duffield or Desiderio. Rather, these decisions looked at the broader question of whether, in light of the FAA and the Civil Rights Act of 1991, Title VII claims were arbitrable. We determined in Desiderio that they were. The Ninth Circuit itself has now come to the same conclusion and has repudiated the Duffield decision. EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 749 (9th Cir. 2003) (en banc). Under Desiderio, Judge Wood's conclusion that Gold's Title VII claims were arbitrable was clearly correct.

B. Do Special Circumstances Justify Holding the Arbitration Clause Invalid?

Gold also argues that there are special circumstances in this case that require us to hold that he is not bound by the arbitration clause. He suggests we follow the First Circuit's decision in Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1 (1st Cir. 1999), to find the Form U-4 arbitration clause invalid in this case. In Rosenberg, the plaintiff had signed Form U-4, but had not been given the rules referred to in Form U-4 that listed the claims that would be arbitrated. In challenging the arbitrability of her Title VII claims, the plaintiff argued that because she had not been given the rules referred to in Form U-4, she was not aware that such claims were arbitrable. The First Circuit found that Title VII claims could be arbitrated. 170 F.3d at 11-12. Nevertheless, the court also ruled that the requirement of § 118 of the Civil Rights Act of 1991

that arbitration be encouraged "where appropriate," 105 Stat. at 1081, demanded a closer look at the specific circumstances in the case. Id. at 8, 19-21. The First Circuit concluded that arbitration was not "appropriate" in Rosenberg because the defendant had certified n3 that the plaintiff would be familiar with the arbitration rules referred to in Form U-4, but had not provided the plaintiff with those rules. Id. at 20. The court held that under such circumstances it was the defendant who should bear the risk of the plaintiff's ignorance. Id. at 19.

Gold argues that his position was similar to the plaintiff's in Rosenberg because he was not given "notice" that employment discrimination claims would be subject to mandatory arbitration. He urges that under the reasoning in Rosenberg, the arbitration clause in Form U-4 should not be enforced with respect to his Title VII claims. n4

We respectfully decline to follow the reasoning of the majority in Rosenberg. While a court may need to determine whether arbitration of Title VII claims is "appropriate" in specific instances, § 118, 105 Stat. at 1081, we think that Gold's failure to fully read and question Form U-4 before signing it undermines his claim that we should find the arbitration clause unenforceable, regardless of whether the rights he seeks to enforce spring from Title VII. Whether one can be bound by an arbitration clause is usually determined by looking at generally accepted principles of contract law. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 131 L. Ed. 2d 985, 115 S. Ct. 1920 (1995); Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 845 (2d Cir. 1987); see 9 U.S.C. § 2; see also

Haskins v. Prudential Ins. Co. of Am., 230 F.3d 231, 239 (6th Cir. 2000); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 834 (8th Cir. 1997). Under such principles, in the absence of fraud or other wrongful act on the part of another contracting party, a party "who signs or accepts a written contract . . . is conclusively presumed to know its contents and to assent to them . . . ." Metzger v. Aetna Ins. Co., 227 N.Y. 411, 416, 125 N.E. 814 (1920); see Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela, 991 F.2d 42, 46 (2d Cir. 1993); Genesco, 815 F.2d at 845. Thus, even if Gold did not understand the form or had questions about the arbitration clause or the rules, as he alleges, the burden was upon him to have his concerns addressed before signing Form U-4. See Consolidated Edison Co. of N.Y., Inc. v. United States, 221 F.3d 364, 371 (2d Cir. 2000); Rosenberg, 170 F.3d at 23 (Wellford, J., dissenting in part). Although it may be troubling that Deutsche Bank certified that it provided Gold with the NASD rules when it had not, it was ultimately Gold's responsibility to ensure he understood the document that he signed.

Moreover, while it would have made sense for Deutsche Bank to have explained the form and to have provided Gold the NASD rules that were incorporated by reference, we do not find on this record that the failure to do so renders the arbitration clause invalid. Form U-4 did advise applicants (in bold, capital letters) to read it carefully. And Gold, a fully competent adult (with an MBA from a top-tier school), does not claim he could not read the print on the form, cf. Lisi v. Alitalia-Linee Aeree Italiane, S.P.A., 370 F.2d 508, 513-14 (2d Cir. 1966), aff'd per curiam by an equally divided court, 390 U.S. 455, 20 L. Ed. 2d 27, 88 S. Ct. 1193 (1967), or

otherwise understand it. Even though Gold allegedly was not given the NASD rules referred to in the arbitration clause, the arbitration clause was broad and plain and put Gold on notice that "any dispute, claim or controversy that may arise between [him] and [his] firm" could be arbitrable. n5 See Rosenberg, 170 F.3d at 23 (Wellford, J., dissenting in part); Halligan, 148 F.3d at 201 n. 2.

Finally, to the extent that Gold argues that Form U-4 was unconscionable, we recognized in Desiderio that Form U-4 binds both parties to mandatory arbitration and "may not be said to favor the stronger party unreasonably." 191 F.3d at 207. "Mere inequality in bargaining power between employers and employees is not alone sufficient to hold arbitration agreements unenforceable." Id. (internal quotation marks omitted).

We recognize that there may be circumstances under which courts will not enforce pre-dispute mandatory arbitration agreements with regard to statutory employment discrimination claims. See, e.g., Halligan, 148 F.3d at 204 (noting that arbitration was mandatory only where claimant could effectively vindicate her statutory rights in the arbitration). But given the very strong federal policy favoring arbitration and the purpose behind the FAA to "place arbitration agreements upon the same footing as other contracts," Gilmer, 500 U.S. at 24, we cannot accept a rule that would allow a party to avoid his legal obligation to read a document carefully before signing it just because the document is an arbitration agreement under which Title VII claims could be arbitrated.

III. Conclusion

In sum, Gold's Title VII claims were subject to compulsory arbitration and we see no persuasive reason why the alleged "special circumstances" justify reversing the district court. We affirm the order of the district court.

Footnotes

n1 Gold's complaint also included discrimination claims under the New York State Human Rights Law, N.Y. Exec. § 296, and New York Civil Rights Law § 40-c, and a claim for breach of an implied covenant of good faith and fair dealing. Judge Wood dismissed these claims when she upheld the arbitration panel's decision and ordered Gold's case closed. Gold's appeal does not discuss them.

n2 Prior to bringing his Rule 60 motion, Gold filed an interlocutory appeal in April 1998. The interlocutory appeal was stayed to allow Gold to file the Rule 60 motion. After the district court denied Gold's motion for reconsideration, Gold reinstated his interlocutory appeal, which was dismissed in October 1999.

n3 Form U-4 requires the employer to sign a statement that "at the time of approval, [the applicant] will be familiar with the statute(s), constitution(s), rules and by-laws of the agency, jurisdiction or self-regulatory organization with which this application is being filed . . . ." In Rosenberg, as in this case, the employer had signed the form, "certifying" the applicant's familiarity with NASD rules.

n4 Gold also relies on Berger v. Cantor Fitzgerald Securities, 942 F. Supp. 963, 967 (S.D.N.Y. 1996), in which the district court ordered discovery to determine whether the arbitration clause was unenforceable. In that case, the principal allegation was that the plaintiff had been informed that Form U-4 was a registered broker test, an outright misrepresentation. Gold has made no such allegation. Moreover, Gold's complaints that the district court ignored other factual allegations similar to those in Berger -- that he was given little time to fill out Form U-4 and was not provided with the NASD rules -- do not justify reversal here. As noted above, those allegations were made for the first time in July 1998 in Gold's motion for reconsideration, even though Gold obviously knew the facts when he filed his complaint approximately 17 months earlier. Therefore, the district court would have been well within its discretion to disregard them. Even if we take the allegations into consideration, as we point out hereafter, Gold has not made a persuasive case for finding the arbitration clause in Form U-4 invalid.

n5 We note that the NASD has voluntarily amended its rules to abolish mandatory arbitration of statutory employment discrimination claims. See Desiderio, 191 F.3d at 201-02.

97-CV-1304 (KMW)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JONATHAN GOLD,
Plaintiff,

-against-

DEUTSCHE AKTIENGESELLSCHAFT, DEUTSCHE MORGAN GRENFELL/C.J. LAWRENCE INC., PETER NASON and GREGORY WILLIAMS,
Defendants

ORDER

WOOD, U.S.D.J.

Parties have notified the Court that arbitration in this action has concluded. Plaintiff now requests that the Court lift the judicial stay on these proceedings, asserting that the agreement to arbitrate is invalid and that Title VII claims are not subject to the mandatory arbitration provision of a U-4 form. Pl.'s Letter February 28, 2003. Defendants object. Def.s' Letter March 5, 2003.

The Court finds that Title VII claims are subject to the arbitration provision of a U-4 form. See Desidero v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 203 (2d Cir. 1999) ('[p]ractically every circuit that has addressed the question has held that the arbitration clause in Form U-4 validly applies to Title VII claims.")

The arbitration panel's decision with respect to whether or not the arbitration agreement is valid therefore controls. See also this Court's March 17, 1998 Opinion and Order at 7 ('the Court finds no merit in any of plaintiff's . . . arguments that plaintiff did not enter into a valid enforceable agreement to arbitrate disputes arising out of his employment with defendants.")

The Court holds that the decision of the National Association of Securities Dealers' ("NASD") Arbitration Panel in this case is final. The Court therefore denies plaintiff's request to lift the Court's 1998 stay of judicial proceedings. The Clerk of the Court is directed to close this case. Any pending motions are moot.

SO ORDERED

Dated: New York, New York
March 7, 2003

Kimba M. Wood
United States District Judge

97-CV-1304 (KMW)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JONATHAN GOLD,
Plaintiff,

-against-

DEUTSCHE AKTIENGESELLSCHAFT, DEUTSCHE MORGAN GRENFELL/C.J. LAWRENCE INC., PETER NASON and GREGORY WILLIAMS,
Defendants

ORDER

WOOD, U.S.D.J.

In an Opinion and Order dated March 17, 1998, familiarity with which is assumed, the Court granted defendants' motion to compel arbitration. Plaintiff now moves for reconsideration pursuant to Federal Rule of Civil Procedure 60(b)(6). For the reasons stated below, plaintiffs motion is denied.

I. Discussion

The standard for reconsideration is strict. Local Civil Rule 6.3 allows a party to seek reconsideration based on "matter or controlling decisions which counsel believes the court has overlooked." The court should reconsider it prior order where:

(1) "the court has overlooked controlling decision that may have influenced the earlier result had they been considered by the court," or

(2) "the court failed to consider 'factual matters that were put before the court on the underlying motion.'"

Travelers Ins. Co. v. Buffalo Reinsurance Co., 739 F. Supp. 209, 211 (S.D.N.Y. 1990) (citations omitted); see also Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995) (reconsideration is appropriate where the "moving party can point to controlling decision or data that the court overlooked"). However, the standard on a motion for reconsideration is "'strict in order to dissuade repetitive arguments on issues that have already been considered fully by the court.'" Travelers, 739 F. Supp. At 211 (quoting Caleb & Co. v. E.I. DuPont de Nemours & Co., 624 F. Supp. 747, 748 (S.D.N.Y. 1985)); see also Shrader, 70 F.2d at 257.

Plaintiff has provided the Court with some reason to reconsider, emphasizing two relevant decisions that were neither briefed by the parties nor considered by the Court in resolving the previous motion. These two decision are Duffield v. Robertson Stephens & Co., 1998 WL 227469 (9th Cir. 1998), and Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, 995 F. Supp. 190 (D. Mass. 1998), in which the courts ruled that Title VII claims are not subject to mandatory arbitration. These decisions, however, represent what is increasingly the minority position. Although the First Circuit affirmed the result reached by the district court in Rosenberg, it rejected the district court's analysis upon which plaintiff relies so heavily. Compary Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, 1998 WL

880910, at *5-14 (1st Cir. 1998), with Pl. Mem. At 6-8, 11-12. The First Circuit further noted that no other court has agreed with the Duffield decision. See Rosenberg, 1998 WL 880910, at *7 (citing Seus v. John Nuveen & Co., 146 F.3d 175, 179, 182-83 (3d Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3323 (U.S. Oct. 19, 1998) (No. 98-719); Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054, 1062 (11th Cir. 1998); Gibson v. Neighborhood Health Clinics, Inc., (7th Cir. 1997); Patterson v. Tenet Healthcare, Inc., 113 F.3d 932, 937 (8th Cir. 1997); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1467-68 (D.C. Cir. 1997); Austin v. Owens-Brockway Glass Container, Inc., (4th Cir. 1996); Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482, 1487 (10th Cir. 1994); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 308, 312 (6th Cir. 1991); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991)).

Within this Circuit, two recent decision have rejected arguments similar to plaintiff's, as well as the decision plaintiff offers in support of reconsideration, noting that these decisions are contrary to the law of this Circuit. See Rand. v. J.C. Bradford & Co., 98 Civ. 4906 (DLC); 1998 WL 872421, at *4 (S.D.N.Y. Dec. 15, 1998) (noting the "overwhelming weight of authority in this Circuit finding arbitration of Title VII claims to be appropriate"); Desiderio v. National Ass'n of Securities Dealers, 2 F. Supp.2d 516, 520-21 (S.D.N.Y. 1998).

Finally, the Court declines to reconsider its earlier Order on the basis of plaintiff's argument that the "special circumstances" of Berger v. Cantor Fitzgerald, 942 F. Supp. 963 (S.D.N.Y. 1996), are present. As the Court noted in its previous Order, the plaintiff in

Berger was presented with a Form U-4 and told it was an application to become a registered broker. Furthermore, the plaintiff in Berger was given little time to fill out the form and was never provided with a copy of the NASD Manual referred to in the Form U-4. See id. at 966. Plaintiff does not allege the outright misrepresentation that occurred in Berger. Thus the Court declines to reconsider its ruling on this basis.

II. Conclusion

For the reasons set forth above, the Court denies plaintiffs' motion for reconsideration. The parties are directed to proceed to arbitration forthwith. The parties are to advise the Court of the status of arbitration by July 15, 1999, unless a decision is rendered by the arbitrators prior to that date.

SO ORDERED.

Dated New York, New York
January 20, 1999

Kimba M. Wood
United States District Judge

97-CV-1304 (KMW)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JONATHAN GOLD,
Plaintiff,

-against-

DEUTSCHE AKTIENGESELLSCHAFT, DEUTSCHE MORGAN GRENFELL/C.J. LAWRENCE INC., PETER NASON and GREGORY WILLIAMS,
Defendants

OPINION AND ORDER

WOOD, U.S.D.J.

Plaintiff brings this action under Title VII of the Civil Right Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq., the Civil Rights Act of 1991, and New York State Human Right Law, N.Y. Exec. Law § 296, N.Y. Civ. Rights Law § 40-c, and other state laws, against his former employer subsequent to his termination effective June 30, 1996. Defendants move to dismiss the complaint pursuant to Rule 12 (b) (1), or in the alternative, for an order compelling arbitration between plaintiff and defendants, and to stay judicial proceedings pending such arbitration pursuant to section 2 through 4 of the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 1 et seq. Defendants also seek attorney's fees and cost incurred in connection with this motion. For the reasons set forth below, the Court

grants defendants' motion to compel arbitration, and to stay judicial proceeding pending such arbitration. The Court denies defendants' requests for costs.

I. Background

Plaintiff was a student in the M.B.A. program New York University's Stern School of Business at the time he was hired by the Deutsche Aktiengesellschaft ("Deutsche New York") in the bank's Management Program. (Compl. ¶¶ 16-22.) Plaintiff decided to accept Deutsche New York's offer of employment largely based on the representations made to him by the various Deutsche New York officials. (Compl. ¶¶ 16-22.) Plaintiff alleges that officials of Deutsche New York represented to him that he would be able to rotate through different departments of the bank, that associates in the Management Program would be groomed from positions of authority in the bank, and that plaintiff's placement in the bank would be tailored to reflect his interests and objectives. (Compl. ¶¶ 18-20.)

Before starting his employment at Deutsche New York in August 1995, plaintiff was required to sign a Form U-4 Uniform Application for Securities Industry or Transfer, which among other things, contained the following arbitration clause:

I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations indicated in item to as may be amended from time to time and that any arbitration award

rendered against me may be entered as a judgment in any court of competent jurisdiction.

(Compl. ¶ 23; Madden Aff. Exh. B at 5.) Item 10 of the Form U-4 indicates that plaintiff is registered with "NASD," the National Association of Securities Dealers, Inc. (Madden Aff. Exh. B at 1.) The NASD Code's arbitration provisions provides for mandatory arbitration of any dispute claim or controversy arising out of the employment of persons associated with any member, or between members and associated persons. See Friedman v. Metropolitan Life Ins. Co., 95 Civ. 10096, 1996 U.S. Dist. LEXIS 19889 *4 (S.D.N.Y. June 18, 1996).

Plaintiff was transferred to Deutsche Morgan Grenfell/C.J. Lawrence, Inc. ("Deutsche Morgan") in April 1996, and terminated by Deutsche Morgan effective June 30, 1996. (Compl. Exh. D.) Both Deutsche New York and Deutsche Morgan are members of NASD. Plaintiff initiated this lawsuit in February 1997 alleging that Deutsche New York maintain a working environment that was hostile to individuals whose sexual preference is for individuals of their same sex. (Compl. ¶¶ 27-31.) Among other allegations, plaintiff claims that he was required to do demeaning work, and subjected to disparaging comments by his supervisors on the basis of his sexual orientation. (Id.) Plaintiff opposes arbitration of his claims against defendants.

II. Discussion

Defendants argue that plaintiff's claims must be dismissed or in the alternative that arbitration must be compelled, and this action stayed. The basis for

defendants' arguments is the arbitration clause in the Form U-4 which plaintiff executed at the beginning of his employment with defendants for the purpose of becoming a "registered representative" with NASD.

Pursuant to the FAA, arbitration agreements in any contract affecting commerce shall be "valid, irrevocable and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract." 9 U.S.C. § 2; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985). The FAA also provides that "a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which would, save for the agreement, have jurisdiction . . . ." 9 U.S.C. § 4. The Supreme Court has made clear the mandatory language of the FAA:

By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985). The FAA also provides for the issuance of a stay of judicial proceedings if the court is satisfied that the issue before it is referable to arbitration under an agreement to arbitrate. 9 U.S.C. § 3. Indeed, enforcement of an arbitration agreement in relation to a particular claim "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." AT&T Tech Inc. v. Communications

Workers of Am., 475 U.S. 643, 650 (1986) (internal citation omitted).

Courts in this circuit have required plaintiffs who have signed agreements containing arbitration clauses, such as the Form U-4, to submit employment discrimination claims to arbitration, and have stayed judicial action pending arbitration. See. e.g., Rice V. Brown Bros. Harriman & Co., No. 96 Civ. 6326, 1997 WL 129396 (S.D.N.Y. Mar. 21, 1997) (compelling arbitration of age discrimination claims under ADEA, and New York state law where plaintiff executed Form U-4 with its arbitration provision); Pilanski v Metropolitan Life Ins. Co., , No. 95 Civ. 10292, 1996 WL 622024 (S.D.N.Y. Oct. 28, 1996) (compelling arbitration of Title VII, ADA, FMLA, and New York city code violations where employee executed Form U-4); see generally Friedman v. Metropolitan Life Ins. Co., 95 Civ. 10096, 1996 U.S. Dist. LEXIS 19889 *6 (S.D.N.Y. June 18, 1996) (summarizing courts in Southern District of New York's treatment of Form U-4's arbitration provisions).

Plaintiff does not contend that his claims in this action are outside the scope of the arbitration provision in the Form U-4 that the signed. Rather, plaintiff relies upon Berger v Cantor Fitzgerald Secs., 942 F. Supp. 963 (S.D.N.Y. 1996), to argue that discovery is required to determine whether plaintiff was fraudulently induced to sign the Form U-4 before the Court should make a determination as to the arbitrability in this action.

In Berger, the court denied a motion to compel arbitration and stay judicial proceedings of the plaintiff's federal employment discrimination claims under Title VII and the Americans with Disabilities

Act, 42 U.S.C. § 12112 (1996), among other federal and state causes of action, pending discovery on plaintiff's allegations that the agreement to arbitrate in Form U-4 was obtained "as a result of misrepresentation, high pressure tactics, and unfair dealing." Id. at 464. The plaintiff in Berger alleged that (1) that he was informed that the Form U-4 was an application to take a test to become a registered broker, without giving him any other information about the form, (2) that he was given no more than five minutes to fill out the form, and (3) that he was never given a copy of the NASD Manual referred to in the Form U-4. Id.

The instant case presents circumstances different from Berger, and does not require the development of the factual record before an order compelling arbitration is issued. Plaintiff makes no allegations similar to those of the plaintiff in Berger concerning the circumstances in which he executed the Form U-4 or any representations as to the meaning of its terms. (See, e.g., Compl. ¶¶ 16-23; Gold Aff. ¶¶ 10-11.) Plaintiff alleges only misrepresentations concerning the terms and conditions of his employment, such as the kinds of tasks would perform, and the flexibility he would have to rotate through different departments in the bank. (See. e.g., Compl. 11 16-23; Gold Aff. ¶¶ 10-11.) Thus the need for development of the factual record before determination of whether arbitration is compelled that was present in Berger is not present the instant case. Plaintiff makes no other allegations which might require further development of the factual record before making a determination of whether to issue an order compelling arbitration. Further, the Court finds no merit in any of plaintiff's other arguments that plaintiff did not enter into a valid and enforceable

agreement to arbitrate disputes arising out of his employment with defendants. See Friedman v. Metropolitan Life Ins. Co., 95 Civ. 10096, 1996 U.S. Dist. LEXIS 19889 (S.D.N.Y. June 18, 1996) (granting motion to compel arbitration and to stay judicial proceedings where plaintiff signed Form U-4, but alleged that she did not have adequate opportunity to read Form U-4).

Because I find that by executing Form U-4, with its arbitration provision, plaintiff entered into a valid and enforceable agreement to arbitrate, I grant defendants' motion to compel arbitration, and to stay judicial proceedings in this action pending such arbitration. Although I reject plaintiff's arguments, I do not find that they were made in bad faith or otherwise warrant the imposition of attorney's fees and costs.

III. Conclusion

For the reasons set forth above, the Court grants defendants' notion to compel arbitration of plaintiff's disputes with defendants, and to stay judicial proceedings in this action pending such arbitration [doc. nos. 3 & 101. The parties are directed to proceed to arbitration forthwith. The parties are to advise the Court of the status of arbitration by September 17, 1998 unless a decision is tendered by the arbitrators prior to that date. The Court also denies defendants' requests for attorney's fees and costs incurred in connection with the instant motion.

SO ORDERED.

New York, New York
March 17, 1998

Kimba M. Wood
United States District Judge

97-CV-1304 (KMW)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JONATHAN GOLD,
Plaintiff,

-against-

DEUTSCHE AKTIENGESELLSCHAFT, DEUTSCHE MORGAN GRENFELL/C.J. LAWRENCE INC., PETER NASON and GREGORY WILLIAMS,
Defendants

AFFIDAVIT IN SUPPORT

STATE OF NEW YORK)
) ss.:
COUNTY OF QUEENS)

JONATHAN GOLD being duly sworn, deposes and says:

1. I am the plaintiff in this matter and, as such, I am fully familiar with all of the facts herein.

2. This affidavit is submitted in support of my instant motion pursuant to FRCP Rule 60 for relief from this Court's order which granted defendants' motion to compel arbitration of my claim under Title VII, and for an order denying defendants' motion.

3. In my final year of study for an MBA degree at New York University I began a series of interviews and meetings with top level officers of the defendant bank (hereinafter "Bank"). During the courts of my interviews, I was told that if I joined the Bank's management program I would be offered the opportunity to grow and realize my potential. At no time during the interview process was I informed that as a condition of my employment I would be required to waive my right to a judicial resolution of discrimination claims arising out of my employment. On January 9, 1995, I accepted the Bank's offer of employment.

4. After a week-long training seminar from August 7 to August 13, 1995, more than 20 other management trainees and I were brought into a back office at the Bank and instructed to sign more than a dozen forms without any explanation of their content; no opportunity to ask questions or review the forms; and, no notice that I would be waiving my right to a judicial determination of any Title VII or other human rights' claims.

5. The entire procedure lasted no more than 10 to 15 minutes with everyone standing around or sitting at the few available desks blindly signing the forms. I later learned that I signed a U-4 form which contained the following clause:

I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations indicated in item 10 as may be amended from time to time and that any arbitration award

rendered against me be entered as a judgment in any court of competent jurisdiction.

6. I was never presented with or shown a copy of the "constitutions," or "by-laws" of the organizations indicated in item "10 . . . ."

7. I never knowingly or voluntarily elected to waive my right to a judicial proceeding in favor of arbitration in the event of a Title VII claim. More importantly, I would not have waived that right as a condition of my employment by the Bank.

8. Thereafter, during my tenure at the Bank I was subjected to numerous instances of quid pro quo and hostile work environment sexual harassment. I was discharged on June 27, 1996 after my attorney contacted the Bank in an attempt to bring about an end to the sexual harassment I had been compelled to endure. The complaint herein details with accuracy the facts which I herewith re-adapt.

9. By reason of the foregoing it is respectfully requested that this motion be granted in all respects.

JONATHAN GOLD

Sworn to before me this
20th day of July, 1998

/s/
Notary Public